U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

DATE: JUN 0 6 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an oil and gas, engineering, and construction services business. It seeks to employ the beneficiary permanently in the United States as a "software developer III" pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition (Form I-140).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The Director determined that the beneficiary did not have an advanced degree, as defined above, and did not satisfy the minimum educational requirement for the proffered position, as specified on the labor certification. In particular, the Director determined that the beneficiary did not possess a master's degree in geology, geophysical science, geological engineering or computer science, or a foreign equivalent degree in one of those fields.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

In a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) issued on April 2, 2012, the AAO requested that documentation be submitted to show that the petitioner had the continuing ability to pay the proffered wage from the priority date (March 28, 2005)[2] up to the present. The petitioner

[1] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] The priority date is the date the labor certification application (in this case, Form ETA 750) underlying the immigrant visa petition was accepted for processing by the DOL.

responded with the requested documentation, and the AAO determines that the petitioner has established its ability to pay the proffered wage from the priority date up to the present.

The remaining issues on appeal, therefore, are the following:

- Are the beneficiary's educational credentials from France equivalent to a U.S. master's degree, which would make him eligible for classification as an advanced degree professional under section 203(b)(2) of the Act?

- Does the beneficiary meet the job requirements set forth on the labor certification (Form ETA 750), which would qualify him for the proffered position?

Eligibility for the Classification Sought

As noted above, the Form ETA 750 in this case is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available, and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith,* 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Immigration Act of 1990 added section 203(b)(2)(A) to the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision except for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the

professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (INS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the INS specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *See Matter of Shah, supra.* Where the analysis of the beneficiary's credentials relies on work experience and/or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." [3] In order to have experience and education equating to an advanced degree

[3] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a

under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree plus the requisite five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2).

For the classification of advanced degree professional the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). (Emphasis added.)

The documentation of record shows that the beneficiary was awarded a "*Diplome d'Ingenieur*" (Diploma of Engineering) from the [redacted] following the completion of a three-year degree program on February 17, 2001.

In his decision denying the petition, dated September 22, 2008, the Director determined that the petitioner failed to establish that the beneficiary's *Diplome d'Ingenieur* is equivalent to a U.S. master's degree.

In his appeal brief counsel asserted that he never received a Request for Evidence (RFE) from the Nebraska Service Center dated May 29, 2008, cited by the Director in his denial decision, and therefore had not submitted any further evidence beyond that initially submitted with the petition. The Director erred in stating that the *Diplome d'Ingenieur* was a three-year degree, counsel contended, because it followed two years of "classes preparatoires" featuring a rigorous courseload of mathematics, physics, chemistry, and "observational" sciences which the beneficiary completed in the years 1995-1997 to gain entry into the [redacted]. Counsel submitted transcripts of the beneficiary's three years of coursework at the [redacted] (though not of his preceding "classes preparatoires"). Thus, the beneficiary's *Diplome d'Ingenieur* actually comprised five years of post-

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specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

secondary study, which counsel claimed is not only recognized as a master's degree in France, but is also equivalent to a master's degree in the United States. As evidence thereof counsel submitted an "Attestation" from the [redacted], an evaluation of the beneficiary's education by a university professor, which supplemented an earlier submitted evaluation from an academic credentials evaluation service, as well as informational materials from [redacted], and the [redacted] created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). In response to the AAO's NOID/RFE counsel has submitted another evaluation of the beneficiary's education and asserts that [redacted] is not a reliable resource for determining the U.S. equivalency of foreign degrees.

The AAO will first address the substance of the *Diplome d'Ingenieur* – including the academic program required to earn the degree and its place in France's educational system – as gleaned from the informational materials submitted by the petitioner and the [redacted] database. The *Diplome d'Ingenieur* is a degree awarded by [redacted], elite schools that operate parallel to France's universities. In comparison to the country's universities, which are comprehensive educational institutions covering a wide range of fields, the [redacted] are smaller in size and narrower in focus, supplying France with engineers, industrial research specialists, managers and administrators. The *Diplome d'Ingenieur* requires five years of post-secondary study following the *baccalaureat* (equivalent to a U.S. high school education). The first two years of study – focused on mathematics and the physical sciences – are called "*classes preparatoire aux Grandes Ecoles*" (CPGE) and are completed either at a [redacted] or at a [redacted] (French high school). At the end of the two-year [redacted] program students must pass a highly competitive examination (*le concours*) to gain admittance into a [redacted]. To earn a *Diplome d'Ingenieur*, three years of engineering studies at a [redacted] are required. The end result is a single degree following five years of post-secondary study.[4]

In the instant case, the beneficiary followed the normal path of two years in a [redacted][5] and three years in a [redacted] to earn his *Diplome d'Ingenieur*.

As evidence of the U.S. equivalency of this degree, the AAO has considered information in AACRAO's aforementioned Electronic Database for Global Education (EDGE). According to its

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[4] It is possible to enter some [redacted] after a certain amount of university study, or a combination of university study and work experience, and earn a *Diplome d'Ingenieur* with less than three years of coursework at the [redacted]. This scenario does not apply to the beneficiary in this case.

[5] As previously mentioned, there is no documentation in the record of the beneficiary's two-year [redacted] program, nor any information as to where, and with what institution, the beneficiary completed it. However, since completion of such a program (and passage of *le concours*) are prerequisites for admission into a [redacted], it is apparent that the beneficiary did complete a two-year [redacted] program.

website, www.accrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions in over 40 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.*

According to its registration page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that U.S. Citizenship and Immigration Services (USCIS) had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

With regard to the *Diplome d'Ingenieur*, EDGE describes it as a "3-year, post-secondary, 2nd cycle program in engineering" that is "comparable to a bachelor's degree in engineering in the United States." [6]

The AAO notes that an annotation on the certified English translation of the beneficiary's *Diplome d'Ingenieur* states that it is "equivalent to the conferral of a Master's Degree." Since this language does not appear on the original French language document, it is simply an assertion of the translator and has no legal weight. However, the substance of the annotation is supported by an '[redacted]' from [redacted] dated October 17, 2008, certifying

[6] EDGE also confirms that the two-year [redacted] precedes, and is required for admission to, a [redacted] offering the *Diplome d'Ingenieur*.

that the beneficiary's title of *Diplome d'Ingenieur* corresponds to a five-year university degree at the level of *Master*.

The *Master* is the middle degree in France's three-degree structure for universities under the Bologna System – *Licence / Master / Doctorat*, or L-M-D. EDGE describes the *Licence* as three years of post-secondary study at a French university, comparable to three years of university study in the United States. EDGE describes the *Master* as a two-year post-secondary program beyond the *Licence* (resulting in five years of post-secondary study) and comparable to a master's degree in the United States. The AAO notes, however, that the EDGE equivalency analysis for the *Master* focuses on the degree awarded by a university in the L-M-D degree structure – *i.e.* upon completion of a two-year post-secondary program following a three-year *Licence*. The EDGE equivalency analysis does not refer to a *Master* recognized in conjunction with a degree awarded by a [redacted] – *i.e.* upon completion of a three-year post-secondary program following a two-year [redacted] The beneficiary's *Diplome d'Ingenieur* is in this latter category of degree that is not addressed in the EDGE equivalency analysis for the *Master*.

The AAO also notes that the *Diplome d'Ingenieur* is a first professional degree for engineers in France. In the United States the first professional degree for engineers is a baccalaureate, not a master's degree. A U.S. master's degree in engineering requires, in general, at least a year of additional study beyond a bachelor's degree. Seen in this light, the EDGE assessment of the *Diplome d'Ingenieur* as comparable to a U.S. bachelor's degree in engineering is consistent with U.S. norms.[7]

Based on the foregoing analysis, the AAO agrees with the EDGE's assessment of the *Diplome d'Ingenieur* as comparable to a U.S. bachelor's degree in engineering.

The petitioner has submitted evaluations of the beneficiary's educational credentials from [redacted] of The [redacted], dated December 20, 2004; from [redacted], an Associate Professor at the [redacted], dated October 20, 2008; and from [redacted] of [redacted] of [redacted] dated April 30, 2012.[8] All three evaluations assert that that beneficiary's *Diplome d'Ingenieur* is equivalent to a U.S. master's degree.

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[7] Another French degree identified in EDGE is the *Mastere Professionnel*, described as a one-year post-graduate program of coursework and internship in a professional field. Entry into the program requires a *Diplome* from [redacted]. According to EDGE, a *Mastere Professionnel* is comparable to a master's degree in the United States. It appears that a *Diplome d'Ingenieur* from ENSG would qualify an individual for admission to a *Mastere Professionnel* program in France, the successful completion of which would be comparable to a U.S. master's degree in engineering.

[8] Counsel claims that a fourth educational evaluation was submitted from [redacted]. The only document from [redacted] in the record, however, is a one-page letter from a translater, dated October 18, 2008, certifying that she had translated the beneficiary's transcript from [redacted] from French into English.

The [redacted] evaluation offers only a cryptic overview of the beneficiary's academic program at the [redacted], and no substantive analysis of his coursework there. Trustforte bases its finding as to the U.S. equivalency of the beneficiary's degree on broad and unsubstantiated statements about "[t]he nature of the courses and the credit hours involved" as well as "the reputation of the [redacted]." [redacted] conclusion that the beneficiary's *Diplome d'Ingenieur* is equivalent to a U.S. master's degree is at odds with EDGE. USCIS uses evaluations of a person's foreign education by credentials evaluation organizations as advisory opinions only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *See Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). Due to the shortcomings discussed above, the [redacted] evaluation has little probative value as evidence of the U.S. equivalency of the beneficiary's *Diplome d'Ingenieur*.

As for [redacted] the AAO has some question as to his qualification to evaluate the beneficiary's degree from [redacted] specializing in geological engineering since [redacted] background does not reveal any education or experience in that field of engineering. Nevertheless, [redacted] broadly asserts that the beneficiary's first and second years of study in the engineering program at the [redacted] "are substantially similar to the third and fourth years of required course work in a four-year Bachelor's Degree program . . . in the United States" and that "[t]he third year of academic course work required by the [redacted] . . . is substantially similar to the required course work leading to a Master's Degree from an accredited institution of higher learning in the United States (emphasis added)." Significantly, [redacted] does not claim that the third year of coursework at the [redacted] is equivalent to completing a master's degree in the United States.

The ICD evaluation of Ms. [redacted] asserts that a *Diplome d'Ingenieur*, because it represents the culmination of five years of post-secondary study in France, is equivalent to a *Master*, which is also awarded after five years of post-secondary study in France. Since [redacted] rates a French *Master* as comparable to a U.S. master's degree, ICD claims that a *Diplome d'Ingenieur* should have the same U.S. equivalency rating. As the AAO previously discussed, however, the *Master* is awarded by a university in the L-M-D degree structure. It is a two-year degree following a three-year *Licence*. The *Diplome d'Ingenieur*, by way of comparison, is a single-degree credential which falls outside the L-M-D degree structure of French universities. Moreover, it is a first professional degree for engineers in France. In the United States the first professional degree for engineers is at the baccalaureate level. For these reasons, the AAO finds the EDGE equivalency analysis – that a French *Diplome d'Ingenieur* is comparable to a U.S. bachelor's degree in engineering – more persuasive than the ICD evaluation authored by [redacted]

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. When opinions are not in accord with other information or are in any way questionable, however, USCIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). *See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). Due to the

shortcomings discussed above, the AAO concludes that the evaluations authored by [redacted] and [redacted] have little probative value as evidence of the U.S. equivalency of the beneficiary's *Diplome d'Ingenieur*.

Counsel challenges the AAO's reliance on information in [redacted]. According to counsel, [redacted] is full of unverified information from unidentified contributors. It is not an independent and unbiased source of information, counsel claims, because it competes with other evaluation services like the ones utilized by the petitioner. Therefore, the AAO should not favor [redacted] in evaluating the U.S. equivalency of foreign educational credentials. The AAO rejects counsel's charges. [redacted] informational resources are well documented on its website. Indeed, the author of the [redacted] profile for France, last updated on August 26, 2009, is identified as [redacted], who is also the author of the ICD evaluation submitted by the petitioner in this proceeding. In reviewing the instant petition, the AAO has not relied on an evaluation by AACRAO, or [redacted] of the beneficiary's specific educational credentials. Rather, it has utilized information from AACRAO's database – [redacted] – that has been vetted by a panel of experts and has general applicability to the full range of educational credentials in France, including the *Diplome d'Ingenieur*. The evaluations submitted by the petitioner, on the other hand, are essentially the individual opinions of their respective authors as to the U.S. equivalency of the beneficiary's French education. The AAO considers [redacted] to be a more reliable resource.

For all of the reasons discussed above, the AAO concludes that the petitioner has failed to establish that the beneficiary is eligible for classification as an advanced degree professional under section 203(b)(2) of the Act based on his *Diplome d'Ingenieur* from the [redacted] in France.

Qualifications for the Job Offered

To be eligible for approval under the immigrant visa petition, the beneficiary must have all the education, training, and experience specified on the underlying labor certification as of the petition's priority date, which is the date the labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).[9] In this case, the priority date is March 28, 2005.

The petition cannot be approved unless the beneficiary qualifies for the proffered position under the terms of the labor certification.

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

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[9] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference [immigrant visa category] status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found in Part A of Form ETA 750. This section of the application for alien labor certification – "Offer of Employment" – describes the terms and conditions of the job offered. It is important that the Form ETA 750 be read as a whole. The instructions for Part A, item 14, provide as follows:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS[10] may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the

[10] On March 1, 2003, USCIS succeeded the INS pursuant to the Homeland Security Act of 2002.

prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education, training, and experience required for the proffered position in this matter, Part A, Blocks 14 and 15 of the Form ETA 750 states the following requirements:

- Education:

  Master's degree, or foreign equivalent, in Geology, Geophysical Science, Geological Engineering or Computer Science.

- Experience:

  1 year in the "job offered" or 1 year in the "related occupation" of "geological modeling having utilized JAVA, C++ and gOcad software package."

The terms of the labor certification are clear. The employer specified that a master's degree or a "foreign equivalent" in one of the specified fields is required for the proffered position. The beneficiary's only post-secondary degree is a *Diplome d'Ingenieur* from a French [redacted], [redacted]d after two years of preparatory study in a [redacted] program and three years of study at the [redacted]. According to EDGE, whose broad expertise on the U.S. equivalency of foreign educational credentials is recognized by USCIS, a *Diplome d'Ingenieur* is comparable to a bachelor's degree in the United States. The AAO concludes that the beneficiary does not have a "foreign educational equivalent" to a U.S. master's degree. Accordingly, he does not satisfy the educational requirement for the proffered position.[11]

Since the beneficiary does not have a foreign equivalent degree to a U.S. master's degree, he does not qualify for the proffered position of "software developer III" under the terms of the labor certification.

Conclusion

The beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act because he does not have a U.S. master's degree, or a foreign equivalent degree, in geology, geophysical science, geological engineering, or computer science. In addition, the

[11] With respect to the experience requirement on the Form ETA 750, the evidence of record indicates that the beneficiary satisfied that element of the labor certification.

beneficiary does does not qualify for the proffered position because he does not meet the terms of the labor certification, which require a U.S. master's degree or an equivalent foreign degree. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed